APPEAL NO. 022148
FILED OCTOBER 11, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on July 22, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) was not engaged in horseplay at the time of his injury; that the appellant's (carrier) contest of compensability was not based on newly discovered evidence that could not reasonably have been discovered sooner; and, that the claimant's disability began on _____, and ended on April 1, 2002. The carrier appealed, arguing that the determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly unjust. The claimant responded, maintaining that there is sufficient evidence to support the determinations of the hearing officer. We note that the carrier additionally filed a reply to claimant's response to carrier's request for review alleging that the burden of proof was misstated in claimant's brief.

DECISION

Affirmed.

HORSEPLAY

The hearing officer did not err in determining that the claimant's horseplay was not a producing cause of the injury he sustained on _____, thereby relieving the carrier of liability. Section 406.032(2) provides that an insurance carrier is not liable for compensation if the employee's horseplay was a producing cause of the injury. Conflicting evidence was presented on the disputed issue. The claimant testified and presented evidence to show that he fell from the tower he was climbing in the course and scope of his employment; that he unhooked his safety harness to go through the mount and slipped and fell; that he was not repelling from the tower at the time he fell; and that the safety manual did not prohibit repelling. The carrier presented evidence from a forensic physicist that opined the accident could not have been a free fall as claimant described and testimony from a coworker who said the claimant was repelling at the time of his fall. The hearing officer was persuaded that the claimant was not engaged in horseplay at the time of his injury. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence and to decide what facts the evidence had established. Garza v. Commercial Ins. Co., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer's decision is supported by sufficient evidence and it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Thus, no sound basis exists for us to disturb the decision on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

NEWLY DISCOVERED EVIDENCE

It is undisputed that the carrier did not contest compensability on or before the 60th day after being notified of the injury and that its contest is based on what is alleged to be newly discovered evidence that could not have been reasonably discovered at an earlier date. The carrier's representative testified that the carrier did not perform an investigation when this claim was initially filed but accepted the claim based upon the statements submitted by the employer. A carrier makes a decision not to conduct any investigation into an injury at its own peril. There are two components to being allowed to reopen compensability or present additional grounds; the information may not only be "newly discovered" but, further, prove to have been unavailable or unaccessible through the carrier's reasonable exercise of its duty to investigate the claim, (in other words, not discoverable at an earlier time). *See* Texas Workers' Compensation Commission Appeal No. 992828, decided February 2, 2000. After review of the record and the complained-of determination, we have concluded that there is sufficient legal and factual support for the hearing officer's determination that the carrier did not have newly discovered evidence which could not reasonably have been discovered sooner by a thorough investigation of the accident site. Cain, *supra*. Accordingly we affirm that part of the hearing officer's decision and order.

DISABILITY

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. We conclude that there is sufficient evidence to support the determination of the hearing officer.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Susan M. Kelley
Appeals Judge